IN THE HIGH COURT OF JHARKHAND AT RANCHI
S.A. No. 132 of 1985

1(a). Phoda Devi
1(b). Suresh Ram
1(c). Naresh Ram
1(d). Baban Ram
1(e). Yogeshwar Ram
1(f). Daughter of Smt. Lalo Devi
2(a)(i). Ramnandan Ram
2(a)(ii). Raghunandan Ram
2(b). Keshwari Ram
2(c)(i). Santosh
2(c)(ii). Binod
2(c)(iii). Bijay
2(c)(iv). Ajay
2(c)(v). Manoj
2(c)(vi). Sanjay
2(c)(vii). Jugnu
2(c)(viii). Batasia Devi
2(c)(ix). Poonam Devi
2(d)(i). Krishna
2(d)(ii). Indradeo
2(d)(iii). Nagwa
2(d)(iv). Matia
2(d)(v). Nagmatia
2(e). Nagwa Devi
2(f). Indradeo Ram
2(g). Nagmatia Devi
2(h). Matia Devi
2(I). Krishna Ram
3(i). Laldeo
3(ii). Lakhdeo
3(iii). Satendra
3(iv). Brijnandan
3(v). Matni Kuer
4. Mangar Mahto
5. Dukhi Mahto
6(i). Dukhi
6(ii). Mangar
7. Chaturgun Mahto
8. Sita Ram Ahir @ Sita Ram Mahto
9. Bhadai Ahir @ Bhadai Yadav
10(i). Jagdeo
11. Ramdeo Mahto

….. ….. **Appellants**

Versus

Ganesh Mahto (Yadav) ….. ….. **Respondent**

CORAM : HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Appellants : Mr. Himanshu Kumar Mehta, Advocate
Mrs. Manjushri Patra, Advocate
For the Respondents : M/s Manjul Prasad, Sr. Advocate

Baban Prasad & Praveen Kumar Varma, Advocates

CAV ON 21.12.2021 **PRONOUNCED ON 21 .01.2022**

1. Plaintiffs are the appellants who have preferred this appeal against the judgment and decree passed in Title Appeal No. 42/1983 affirming the judgment passed in T.S. No. 70/1973 by the Addl. Munsif-I, Daltonganj.

2. Because the parties are many and this Judgment is in second appeal, it will be more convenient to refer to them by their placement in the original suit and will include L.Rs. of those who died in the meantime during the pendency of the suit and appeal.

3. The plaintiff filed a suit for declaration that the suit land was their raiyati land, for confirmation of possession and permanent injunction, on the ground that the plaintiffs were heirs and descendants of the recorded tenant of the suit land whereas defendants were sons of recorded darraiyat Nanhku Mahto.

4. The suit land comprises of 2.30 acres of land under Plots Nos. 50, 54, 71, 85 and 53/205 appertaining to Khata No. 15 (mentioned in Dar-riayti Khatan no.6) of village Balha, Thana No.63 formerly within Chatterpur now within P.S. Hariharganj, District Palamu.

5. The suit land was recorded in the name of **Jagan Chamar** ancestor of the plaintiffs nos. 1 to 3 who held one share; in the name of **Sheo Balak Mahto** and predecessor-in-interest of plaintiff nos. 4 to 10 (two shares); and also in the name of **Chulai Mahto and Pachu Ahir** in the last cadastral survey (one share each). Jadu Mahto son of Chulai Mahto inherited his entire share. Chulai died leaving behind his son Jadu Mahto who sold his share to Dukhi Mahto through registered **Sale deed on 15.4.1942**. Dukhi Mahto sold his entire share to Khunji Mahto through sale deed dated **29.5.50**. Plaintiff nos. 12 to 14 are heirs and descendants of the line of Khunji Mahto. Plaintiff no.11 is the heir and descendant of recorded tenant Panchu Ahir. Bifani Ahirin grand-daughter of recorded tenant Sheo Balak Mahto sold her entire share in Khata No.15 of 0.43 ¾ acres vide registered sale deed dated **2.3.70 to plaintiff nos. 4 to 7.**

6. Near about the last survey and settlement operation, Nanhku Ahir the father of the defendant was inducted as Dar-raiyat in respect of the suit lands as Dar-raiyat and Dar-riyat Khata No. 6 was prepared in his name.

Shortly after the survey the recorded tenants of khata no. 15 took in 'Sir' possession of the five plots for which Dar-riyati Khata No. 6 was prepared in the name of Nanhku Ahir. As such the recorded tenant Nanhku Ahir had no occasion to pay rent to the recorded tenants nor he was in possession. Soon after the survey,

the recorded, dar-raiyat Nanhaku Ahir surrendered the suit land having duly executed deed of Bajidawa in favour of recorded tenants of Khata No. 15.

According to law or custom, Dar-raiyati interest is not heritable on the death of the recorded Dar-raiyat Nanhku Ahir by his heirs and descendants. Nanhaku had taken 2 acres of Gairmajurwa lands in village Balha. His wife had predeceased him and after his death his minor son Raghuni Ahir (defendant) went to his Nanihal, Gosaindih and returned to village Balha only a few years before the vesting in the State of Bihar in the year 1955 under the B.L.R. Act, and purchased some land from Keshar Mahto in the year 1951 and constructed a house and is residing in it since then.

Cause of action arose on trouble caused by the defendants when a proceeding under Section 144 Cr. P.C was initiated by the plaintiffs which was registered as Misc Case No. 328 of 1971 against the defendants. This proceeding was later on converted into a proceeding under Section 145 Cr. P.C in which an adverse order was passed against the plaintiffs, hence this suit.

7. Case of the defendant is that defendant's father was in possession of Plot Nos. 50, 54, 71, 85 and 53/205 of village Balha and was paying fixed annual rent of Rs.5 and 8 since several years before the survey operation through the raiyat of Khata No. 15. These khatas were also surveyed under the same khata showing all these lands under Dar-raiyati Khata No.6. The defendants are in continuous possession of the suit land. It is further pleaded that Dar-Raiyati interest in this village is non-resumable. The raiyats cannot eject their Dar-raiyats and the interest is inheritable and transferrable according to the law and custom of the village. It has been denied that Nanhaku Mahto had taken any settlement and the story of his migrating to his Nanihal has also been denied. The plaintiffs have no possession over any plot of the suit land.

8. The following issues were framed on the basis of the pleadings of the parties:

a) Have the Plaintiffs any cause of action?
b) Is the suit as framed maintainable?
c) Is the suit barred by laws of limitation and adverse possession?
d) Is the suit land raiyati lands of the Plaintiffs and are they in possession thereof?
e) Has the defendant any title, interest and the possession over the suit land?
f) To what relief or reliefs the Plaintiffs are entitled?

9. The suit was dismissed by the Munsif, Palamau on 17.2.77 against which the plaintiffs preferred Title Appeal No. 9/77 which was remanded vide order dated 9.6.81 to the learned trial Court to amend the plaint and dispose of the suit.

10. After the remand, paragraph-6 of the plaint was amended as follows:

> "That soon after the Survey the recorded raiyat Nanhku Mahto surrendered the suit lands by having duly executed Bazidawa in favour of the recorded tenant of Khata No.15 the later took the lands in 'Sir' possession of the five plots for which Dar-Raiyati Khata No.6 was prepared in the name of Nanhku Ahir and such Nanhku Ahir had no occasion to pay rent of Rs.5/8 to the recorded tenants nor he was in possession"

11. The trial Court recorded finding of fact that the suit land, though raiyati land of plaintiff is not coming under their possession on which the defendant and before him his father Nanhku Ahir, the recorded Dar-raiyat, have been coming in continuous peaceful possession of the suit land since the time of last survey and as such, they have acquired title by law of adverse possession.

12. The learned Court of appeal while confirming the judgment of the court below held that plaintiffs were not in possession of any part of the disputed land and defendant were in cultivating possession of the disputed land since before the survey settlement operation i.e. to say for about 65 years. With regard to the question whether the defendant could be ejected from the disputed land and that the right of under raiyat is not heritable it has been held by the court below that according to the provision of the CNT Act, an under raiyat could not be ejected except in execution of decree by the order of the Deputy Commissioner in writing. The village note (Exhibit-B) of village-Balha, Thana- Chhotapur pertaining to village Thana No. 63 shows that under raiyat could not be ejected from the lands recorded in his name.

13. The appeal has been admitted for being heard for the following substantial question of law:-

(i) Whether in view of the clear provision of Section 9 (appears to be typographical error should be Section 6) of CNT Act and as interpreted by 1941 Patna 485 the court below could have held that the raiyat in section 6 includes an under-raiyat?

(ii) Even assuming that an under raiyat cannot be ejected save and except in execution of a decree passed by a court or the Deputy Commissioner, in view of the admitted position that the recorded under raiyat was dead,

whether the onus was on the respondent to prove that under raiyati interest was heritable by custom?

(iii) Whether the suit could have been decreed as barred by limitation and adverse possession when the right claimed by the respondent in the suit property was of an under-raiyat?

14. The Co-ordinate Bench of this Court vide Judgment dated 30.8.2001 allowed the appeal setting aside the Judgment and decree passed by both the trial and the appellate Court.

15. The defendant's appeal by Special Leave was allowed by the Hon'ble Supreme Court of India and matter was remanded back for fresh disposal of appeal vide order dated 3.10.13.

16. From the pleadings of the parties, the admitted position emerges that the plaintiffs are the recorded raiyat of Khata No.15 of village Balha and the predecessor-in-interest of the defendants Nanhku Ahir was the recorded Dar-riyat of Dariryati Khata No.6 who was paying rent through the raiyat of Khata No.15. Plaintiff's suit is based on the plea that Dar-raiyati interest is not heritable or transferrable, accordingly after the death Dar-raiyat Nanhku Ahir his heirs did not acquire right or interest in the suit lands. The averments made in paras 1 to 4 of the plaint which though not admitted in para-5 of the written statement have not been denied either. The averment in para 5 of written statement is evasive in nature and therefore in terms of Order 8 Rule 5 the genealogy and sale by different registered sale deed can be regarded as admitted by the defendant.

Before adverting to the facts of the case and determination of substantial question of law a brief reference to the law on the status of under-raiyat or Dar-raiyat shall be necessary which is quite different from that of raiyat.

It has been held in **Rampratap Marwari Vs Lachman Mistry AIR 1941 Patna 485** that Section 6(2) of the CNT Act makes the position clear that a person cannot be deemed to be a raiyat, unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari Khunt-Khattidar. An Under-raiyat may be a tenant but he is not a raiyat. There are only three class of raiyat mentioned under Section 4 of the Act and these are occupancy raiyats, non-occupancy raiyats and raiyats having Khunt-katti rights. Under-raiyats, on the other hand, are described as tenant whether holding mediately or immediately under the raiyat.

In **AIR 1964 Patna 31 Juhan Oraon & ors Vs Sitaram Sao** it has been held that the interest of an under-raiyat (dar raiyati interest) with occupancy status

is not heritable under the law though it may be heritable by custom. While following the law laid down in Much Ram Bagal Vs Balaram Bhumji, AIR 1930 Pat. 562 and Jugesh Chandra Vs Maqbul Hussain, AIR 1936 Pat 384 it was held that interest of an under-raiyat with occupancy status is not heritable under the law, it may be heritable by custom. If the custom of heritability is not established, the status of a party claiming occupancy right by inheritance from an under-raiyat is that of a trespasser and he can be ejected by the raiyat.

Sandhya Rani Devi VS Gour Chandra Panda, 14 Oct 2003 2004 1 BBCJ(Jhar) 23; 2004 1 JCR 98;

The right of an under-raiyat is neither transferable nor heritable unless there is a custom or usages contrary to that. The right of an under-raiyat survives till his life and it extinguishes on his death.

In **Ibrahim Mian Vs Munsaf Mian 2004(2) JLJR 547(Jhr)** this Court held that Dar-raiyat khata is neither heritable nor transferable without there being prevalent local custom in the locality which is duly proved.

It has been held in **2010 (3) JLJR 450 (Debu Napit and others Vs. State of Jharkhand and others)** that if there is specific Act defining right of under raiyat, customary right cannot be allowed to, prevail over specific provision of Act. It was held that there was no provision in the C.N.T. Act granting a right of occupation and cultivation to the heirs of "Dar-raiyat" or under raiyat. Since the appellants in that case where legal heirs of Dar-raiyat i.e. under raiyat, and there being no provision under the Chhota Nagpur Tenancy Act to inherit the right of cultivation after the death of under-raiyat, the appellants were denied the right of cultivation.

Section 4 of the CNT Act describes following classes of tenants:-

i. xxxxxxx
ii. Raiyat, namely
    a. Occupancy-raiyats, that is to say raiyats having a right of occupancy in the land held by them,
    b. Non-occupancy raiyats having no such occupancy right .
    c. Raiyat having khunt katti rights.
iii. Under-raiyats, that is to say tenants holding whether immediately or mediately under raiyats.
iv. xxxxx

Legal incidence of a raiyat and under-raiyat under the CNT Act are quite different as is evident from the above definition. Though both come under the

definition of tenant, but the under-raiyat holds the land under a raiyat. Right of occupancy is secured to class of raiyats mentioned under Chapter-IV from Sections 16 to 36. Under Section 22 an occupancy **raiyat** cannot be ejected from his holding except in execution of decree for ejectment on the grounds specified therein. Under Section 23 occupancy-right of a raiyat has been made heritable subject to local custom to the contrary.

From the above, it follows that under the tenancy Act the legal status of a raiyat and under raiyat is very different. While the former has a right of occupancy and is also heritable like any immovable property, the same does not apply to under-riyat, except where it is made hereditary or transferable by custom.

17. Here in the present case the plaintiffs are the raiyat and defendant the under-raiyat. It is the case of the defendant that Dar-raiyati interest in village Balha was non-resumable and raiyats could not eject their Dar-raiyats and the interest was inheritable and transferable according to the custom of the village.

18. Trial Court has held in para 6 of the Judgment that on the basis of the village note that under-raiyat was not liable to ejectment and no contrary evidence has been led. Further it has also been noted that the tenant could be ejected only under an execution decree or in execution of an order of the Deputy Commissioner under Section 68. Under-raiyat was also a tenant within the meaning of definition of Tenant under Section 4 of the CNT Act. The Appellate Court concurred, with the finding of fact in para 22 of the Judgment on the basis of the village note (Ext B) in support of such a custom that Dar-raiyat could not be ejected. On the question whether Dar-raiyati interest was heritable or not, the appellate Court held that it was pleaded by the plaintiff that there was no custom in village Balha that an heir of an under-raiyat had a right to inherit the land held by him after his death, which was contested by the defendant, therefore it was for the Plaintiff to prove this part of the assertion.

There is a fundamental difference between Burden of Proof under Section 101 and onus of leading evidence under Section 102 of the Evidence Act. While the former is always on the Plaintiff and it never shifts, later keeps shifting during the course of trial. It has been held in **Lakshmana Vrs. Venkateswarlu, AIR 1949 PC 278** "The initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff".

Further, in **Anil Vs. Gurubukhas AIR 2006 SC 1971**it has been held that in terms of section 102 initial onus is always on the plaintiffs and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstance which would disentitle the plaintiffs to the same.

I am of the considered view that the appellate Court was in clear error of law to cast the onus of proving that there was no custom that under-raiyat was not heritable on the plaintiffs. It amounted to cast an onus to prove the negative. It is the specific case of the plaintiff that they were the raiyats and defendant was the under-raiyat whose interest was neither heritable nor transferable. As discussed above, the law is crystal clear on the point that the interest of the Dar-raiyat is neither heritable nor transferable save and excepted allowed by local custom. In this view of matter defence of the defendant who was the son of the recorded Dar-raiyat was grounded on the plea of heritability of Dar-raiyati interest. So, if the local custom was not proved , it was the defendant who was to lose the case because after the death of the Dar-riyat he could not inherit his interest. Therefore, the Burden to prove the local custom that Dar-raiyati interest being heritable was on the defendant and not on the plaintiffs under Section 102 of the Evidence Act which reads as follows:

"**On whom the burden of proof lies-** The burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side."

The Second substantial question of law is accordingly answered in favour of the plaintiffs that the onus was on the defendant to prove that under raiyati interest was heritable by custom.

19. Ext.-B which has been adduced on behalf of the defendant is a village note dated 13.2.73 of Hazaribagh settlement of village Balha, Thana-Chatterpur, Thana No.63 under the seal of the settlement officer which is in response to two queries as follows :

Is an under-raiyat always liable to (a) Ejectment? (b) Enhancement?

The answer to query is (a) No and to (b) yes.

This village note is not an evidence on the heritability or transferability of the Dar-raiyati interest and is confined to ejectment. It is only an evidence of the local village custom that Dar-raiyat could not be ejected, which insulates the original Dar-raiyat from ejectment, but it is of no avail for his heirs or descendants. It is relevant to note the suit has not been brought against the Dar-raiyat but against

his son. Dar-raiyat Nanhku Ahir as per Plaintiff's case died 40 years before the filing of the suit and as per the defendant's case he died 30 years before. Learned Court below have referred to Section 68 which is not much relevant for the present purpose as it only protects a tenant from ejectment save and except in execution of a decree or by the order of the Deputy Commissioner. Thus the defendant has failed to prove his averment that the Dar-riyati interest was heritable and transferable and therefore the under-raiyat cannot be regarded as raiyat.

In view of above discussion, the first substantial question of law is answered in favour of the Plaintiff/Appellant that the raiyat in section 6 of the CNT Act does not include an under-raiyat.

20. The third substantial question of law is whether the suit could have been decreed as barred by limitation and adverse possession when the right claimed by the respondent in the suit property was of an under-raiyat?

Under **Section 54 -** The transfer of Property Act, 1882 *''Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*

Sale how made.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made ***only by a registered instrument.***

1In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

This is the statutorily prescribed for transfer of property. This is called transfer *intervivos* i.e, transfer by a living person to another.

Section 17 of the Registration Act of 1908 provides the following documents shall be registered namely—

(*a*) instruments of gift of immovable property;

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(*c*) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(*d*) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent

The object of registration is explained in ***Lachhman Dass v. Ram Lal*, (1989) 3 SCC 99 at page 106**

1"4. The real purpose of registration is to secure that every person dealing with the property, where such document requires registration, may rely with confidence upon statements contained in the register as a full and complete account of all transactions by which title may be affected. Section 17 of the said Act being a disabling section, must be construed strictly. Therefore, unless a document is clearly brought within the provisions of the section, its non-registration would be no bar to its being admitted in evidence."

Apart from this, a deed of conveyance of property is effected after proper stamping as per the provision of the Stamp Act.

Thus, a registered deed of sale executed by a person having a valid title to the property is a valuable document of transfer of title from the vendor to the vendee and have a sanctity under law. The position where the transferor did not have an interest is different and is covered by the principle of *nemo dat quod non habet*. When a registered sale deed is there, the challenge to it has to be specific i.e., pleadings with particulars which has to be proved. Unless it is sufficiently pleaded and proved the transfer deed holds good.

The above discussion is germane to the present case in as much there had been different registered sale deeds with respect to part of the suit property in 1942, 1950 and 1970 amongst the plaintiffs transferring title. Plaintiffs nos**-12 to 14** acquired portion of the suit land by registered sale deed executed by the heirs and descendants of the recorded tenant through sale deed dated **29.5.50 (Ext 1/A)**. Plaintiff no.11 is the heir and descendant of recorded tenant Panchu Ahir. Bifani Ahirin grand-daughter of recorded tenant Sheo Balak Mahto sold her entire share in Khata no.15 of 0.43¾ acres vide registered sale deed dated **2.3.70 (Ext 1)** to plaintiff nos. **4 to 7.** As discussed in para 16 of this Judgment, these facts have not been specifically disputed and is deemed to be admitted by the defendant. These documents are evidence that the plaintiff's were in possession and were dealing

with it since long by exercising the right of sale and purchase with respect to the suit property.

The defendants have not filed a chit of paper except for the order in the proceeding under Section 145 Cr.P.C on the point of possession, yet both the learned Court below have held the possession in favour of the defendant on the basis of conflicting oral evidence.

The plea of the suit being barred by limitation and adverse is not at all tenable in the facts and circumstance of the case for the following reasons:

Firstly, after the death of the Dar-raiyat Nahku Ahir his son did not inherit the Dar-raiyati interest for the reasons discussed in the earlier part of the Judgment. Therefore with the death of the dar-raiyat the title of the defendant over the suit land got extinguished and got vested in the original raiyat. The first precondition for claiming adverse possession is that the party claiming should acknowledge the title of the party against whom it is being claim. Claim of title by inheritance and that by adverse possession cannot go together. In **Karnataka Board Of Wakf VS Government Of India, 2004 10 SCC 779**it has been held by Hon'ble The Supreme Court of India that the pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it.

Secondly, "Adverse possession" means hostile possession which is expressly or impliedly in denial of the title of the true owner. Such possession must be actual and exclusive under a claim or right adequate in continuity in publicity and in extent so as to show that it is adverse to the true owner. The plea must be taken in the pleading and a specific averment as to the point of time from which possession become adverse is necessary. Plea of adverse possession cannot be sustained in the absence of *animus possidendi*. Mere possession for the statutory period is not sufficient unless there is an assertion of hostile title possession be it of whatever length does not ripen of title.

Thirdly, Permissive Possession is not adverse and can be terminated at any time by the rightful owner. In the absence of evidence to support the plea of openness hostility are notoriety such possession will not establish adverse

possession permissive possession cannot be converted into adverse possession unless it is proved that the person in possession asserted hostile title therein far a period of 12 years or more. Here the defendant who is the son of under-raiyat cannot prescribe against the original raiyat.

The pleading of defendant is bereft of the fundamental ingredient of adverse possession. On the contrary, the defendant has unsuccessfully claimed title on the basis of inheritance from the original Dar-raiyat, therefore he cannot at the same time prescribe against the Plaintiff.

I, therefore, find that the suit of the plaintiff was not barred by the law of adverse possession.

Under the circumstance and for the reasons discussed above, all the three substantial question of law is answered in favour of the Appellant/Plaintiff. I find that both the learned Courts below were in manifest error of law to dismiss the case of the plaintiffs.

The Plaintiff's suit is accordingly decreed. The registry is directed to prepare a decree declaring the Plaintiff/LRs after re-verifying their current addresses declaring that the Plaintiffs (LRs) has the title over the suit property fully described in the schedule of the plaint in possession and entitled to be in possession. The defendants (LRs) do not have any right over the suit property and they are restrained from interfering with the plaintiff's right.

As the matter is very old Registry to frame the decree after incorporating the names and addresses of the parties after verifying the current situation, the counsel of both the parties are directed to assist the Registry.

Appeal succeeds. The Judgment of the lower Court is set aside and the suit is decreed. There will be no order as to cost.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi
Dated the 21st January, 2022

AFR / AKT